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In The

Supreme Court of the United States

October Term, 1989

SYLVIA AVERBACH,

Petitioner,

vs.

RIVAL MANUFACTURING COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Is it a violation of the Seventh Amendment to discharge a jury after the plaintiff has been successful in the first phase of a bifurcated civil fraud trial? The jury found that the defendant deliberately misrepresented and intentionally concealed crucial facts within the course of discovery upon which the plaintiff relied to her detriment in prior litigation involving a fire loss due to defendant's product.

2. When a plaintiff, subsequent to the perusal of defendant's records secured through discovery, seeks to amend her federal complaint to buttress her state fraud action and to assert a claim under the RICO Act and Consumer Products Safety Act (15 USC §2051 et seq.), is the refusal to permit said amendment, on the basis of "surprise" and "prejudice" to defendant, an abuse of discretion?

3. When a defending litigant's records, secured through discovery in a fraud action, reveal material misrepresentations/omissions during the discovery stage of the underlying product liability action, including 1975 warnings from the Consumer Products Safety Commission to said defendant to report "hazards" related to its electric can openers, does plaintiff enjoy a private right of action under 15 USC §2051 et seq. by reasons of defendant's failure to adhere to the rules, regulations, and/or warnings issued by the CPSC, when a 1977 fire, allegedly caused by defendant's can opener, substantially damages plaintiff's home?

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OPINION IN THE COURT BELOW

The opinion of the U.S. Court of Appeals for the Third circuit appears at 879 F2d 1196 (3rd Cir. 1989) and is reproduced as Appendix A. The opinions of the United States District Court for the Eastern District of Pennsylvania are reproduced as Appendix B.

JURISDICTION

The opinion and Order of the United States Court of Appeals for the Third Circuit were entered on July 19, 1989. A Petition for rehearing en banc was denied on

August 17, 1989. (Appendix C). This petition was filed within ninety days of that date, the Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES INVOLVED

The Statutes involved are the Racketeer Influence and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 et seq., the Consumer Product Safety Act (CPSA) 15 U.S.C. § 2051 et seq., and the Seventh Amendment to the United States Constitution.

STATEMENT OF THE CASE

During 1978, Sylvia Averbach filed an action against Rival Manufacturing Co., for a fire to her home allegedly caused by an electric can opener. During discovery Rival asserted that it had had only one can opener fire. During June 1981 a jury returned a verdict for Rival.

Later Counsel for Mrs. Averbach learned that Rival had over twenty three (23) fires, but a Motion for a new trial under Fed R. Civ. P. 60 (b) was denied and affirmed by the Third Circuit. *Averbach vs. Rival,* 779 F2d 41 (3rd Cir. 1985).

During May 1985, Mrs. Averbach filed a two count complaint alleging fraud and a violation of the RICO Statute. The District Court dismissed the entire complaint for failure to state a cause of action.

In the opinion filed in *Averbach vs. Rival Manufacturing Co.*, 809 F2d 1016 (3rd Cir. 1987), the Third Circuit stated in part:

> "If the information from the files of the [CPSC] about fires begun by Rival electric can openers is true, the answer to interrogatories served in the underlying action are grossly false . . . " 809 F2d at 1018

The Third Circuit reversed the dismissal of the Fraud count, but affirmed the dismissal of the RICO count. Regarding the RICO claim the Third Circuit stated in footnote 1:

> "Averbach did not plead, and does not here contend that Rival Manufacturing Company's affairs were conducted in such a manner as to make Rival an enterprise for RICO purposes." Footnote one, 809 F2d at 1018

Mrs. Averbach filed a Petition for Writ of Certiorari on the dismissal of the RICO claim and Rival filed a cross petition during the summer of 1987.

Following the U.S. Supreme Court's decision in *Agency Holding Corp. vs. Malley-Duff Assoc*, ___ U.S. ___, 107 S.Ct. 2759, 97 LEd2d 121 (1987), Mrs. Averbach's counsel filed an action to preserve the RICO claim pursuant to footnote One in *Averbach vs. Rival*, 809 F2d 1016. This action was dismissed for improper splitting of a cause of action which was affirmed in *Averbach vs. Rival Manufacturing Co.*, 845 F2d 1009 (3rd Cir. 1988).

During the Fall of 1987, Rival's cross petition was denied and the record was returned to the District Court. Mrs. Averbach then attempted to amend her complaint, but did not attach a copy of the proposed complaint even

though a Third Circuit opinion does not consider this to be fatal, *Centifanti vs. Nix*, 865 F2d 1423, n.10 (3rd Cir. 1989). The motion to amend was denied because the proposed amendment was not attached.

During January 1988, Rival was ordered to disclose all fires of all makes and models of electric can openers. Rival revealed over one hundred fires (100) and its records showed a violation of the Consumer Product Safety Act. Further as a result of a notice placed in the *ATLA Advocate*, Averbach's counsel learned of the 1986 Beaver County Pa. case of *Cobus vs. Rival* Court of Common Pleas, Beaver County Pa. No. 641 of 1985 in which Rival revealed only two of one hundred fires. The magnitude of the fraud and perjury in other cases precipitated another motion to amend the complaint pursuant to footnotes 1 and 2 of *Averbach vs. Rival*, 809 F2d 1016 (3rd Cir. 1987). This motion was filed during March 1988. The Motion was denied and a trial was held during July 1988 resulting in a verdict for Mrs. Averbach during the first phase of a bifurcated fraud trial.

The District Court discharged the jury before the second phase and requested that Rival file post trial motions. The District Court granted Rival judgment N.O.V. Mrs. Averbach appealed. The Third Circuit reversed the Judgment N.O.V., affirmed the denial of the Motion to amend and reserved the question for the Seventh Amendment violation for a later time. *Averbach vs. Rival*, 879 F2d 1196 (3rd Cir. 1989).

Mrs. Averbach filed a petition for rehearing en banc which was denied on August 17, 1989 (Appendix C).

REASONS FOR GRANTING THE WRIT

Introduction

This Court has never before addressed the myriad issues inherent in the instant case, in which the defendant's monumental deception within the course of the discovery process contains incidents of mail fraud, wire fraud and obstruction of justice, all predicate acts pursuant to the RICO Act, as well as common law fraud and a violation of the Consumer Products Safety Act (CPSA). This nationwide pattern of materially intentional misstatements and deliberate omission perpetrated by defendant-respondent Rival Manufacturing Company has been exacerbated by a district court which dismissed the jury following its determination of Rival's absolute liability for fraud in a bifurcated trial, thereby violating plaintiff-petitioner's Seventh Amendment right to have the same jury deliberate the intricately related issues of punitive and compensatory damages. Moreover, Rival's own documentary evidence establishes proof of it's failure to adhere to the dictates of the CPSA, as well as that Commission's specific warnings to Rival to report safety hazards related to their electric can openers which, to date, have caused at least one hundred fires throughout this nation.

A determination of the issues thus presented is crucial to maintaining and encouraging the continued integrity of the discovery process; to the formulation of principles wherein members of the public are adequately apprised of their right to bring a private action pursuant to the CPSA, 15 U.S.C. §2051 et seq; and finally, vital to ascertaining the applicability of RICO to litigants who persist in preverting the process created by this court to

"make a trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States vs. Proctor & Gamble Co.*, 356 US 677, 682, 78 SCt 983, 986, 2 LEd2d 1077, 1082 (1958). The particular issues herein are presented below.

1. Violation of the Seventh Amendment.

In *Averbach vs. Rival Manufacturing Co.*, 879 F2d 1196 (3rd Cir. 1989) the Court stated in part:

> "Over Averbach's objection, the district court agreed to Rival's proposal to try the case by means of a bifurcated trial, with the first phase directed only to the question of whether the interrogatory responses were fraudulent, and the second phase to the issues of causation and damages. We note that this division is not along the common line of bifurcation between liability and damages. Nonetheless, Fed. R. Civ. P. 42(b) expressly authorizes a separate trial of any separate issue under certain circumstances, subject to Seventh Amendment considerations . . . " 879 F2d at 1198_

The Court went on to state:

> "Our disposition makes it unnecessary for us to rule at this time on Averbach's contention that the district court's dismissal of the jury that heard the evidence in Phase One violated her right to a jury trial under the Seventh Amendment. Rival, of course, having proposed the bifurcation and the dismissal of the first jury cannot now be heard to object. Averbach will be able to obtain review of claims of error related to these issues if she is aggrieved by the final outcome of the proceedings . . . " 879 F2d at 1202

The jurors who were presented with the *fraudulent* conduct are the ones who are most qualified to award damages and in particular punitive damages for what is *outrageous* conduct not only in this case, but several other cases.

In footnote 1 of *Averbach vs. Rival*, 879 F2d 1196 the Court stated:

> "1. It was agreed that under this court's precedent, it was not necessary to reenact the underlying product liability action to establish causation. See *Honeywell, Inc. vs. American Standards Testing Bureau, Inc.*, 851 F2d 652, 655-57 (3d Cir. 1988). cert denied, 109 S. Ct 795 (1989) (in negligent action for failure to supply a promised witness at trial causation may be established by expert testimony) . . . " Footnote 1 879 F2d at 1198

The only remaining issue is damages. It would be a violation of the principle of judicial economy and the Seventh Amendment to retry the Fraud issue.

The Seventh Amendment to the United States Constitution provides in pertinent part:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of a jury trial shall be preserved . . .

Indeed, as [Chief] Justice Rehnquist has observed:

> The founders of our nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.

Parklane Hoisery Co., Inc. vs. Shore, 439 US 322, 343, 99 SCt 645, 58 LEd2d 552 (1979) [Rehnquist, J., dissenting; footnote omitted]. He reiterated the 1943 concern of Justice Black that "Judicial erosion . . . of the essential guarantee of the Seventh Amendment . . . continues apace . . . " Id. at 339. Thus:

> Whether a party is deprived of a jury trial as contemplated by the Seventh Amendment when some of the issues are submitted to one jury and other issues to a second jury, is a mo[st] difficult question to resolve.

Hosie vs. Chicago & Northwestern Ry., 282 F2d 639, 642 (7th Cir. 1960). Guiding principles, however, have been enunciated by the United States Supreme Court. Where the questions sought to be bifurcated are "so interwoven . . . that the [one] cannot be submitted to the jury independently of the [other] without confusion and uncertainty, the bifurcation [i]s unconstitutional." *Gasoline Products vs. Champlin Refinery Co.*, 283 US 494, 500, 51 SCt 531, 75 LEd2d 384 (1961). The issues in the instant case, especially given the language of the lower court's bifurcation Order and the pretrial discussions upon which the Order was premised were too interwoven to permit a second jury to pass on phase two of the trial without unconstitutionally compromising plaintiff's right to a fair jury trial. We refer specifically to the issue of defendant Rival's alleged wanton conduct in formulating and submitting *false* discovery responses, which served not only as the predicate for compensatory damages, but for exemplary damages as well.

There is one case which addresses the issues with which we are here concerned, to-wit: bifurcation, separate juries, causation/reliance, and the Seventh Amendment guarantee of a civil jury trial; one that arose within the context of misrepresentations or omissions of material facts. *Arthur Young & Company vs. United States District Court*, 549 F2d 686 (9th Cir. 1977). The *Young* claims were asserted under statutory fraud provisions [i.e., SEC Rule 10b-5]. However, it has long been recognized that ordinary principles of the traditional law of fraud play a critical role in such statutory fraud cases. *Rochez Bros., Inc. vs. Rhoades*, 491 F2d 402 (3rd Cir. 1973).

The *Young* defendants sought mandamus pursuant to the following class certification order:

> (a) As to the issues of liability of general application, excluding the following issues: reliance or causation, duty owed to the individual claimant insofar as it may vary depending on the status of that claimant, knowledge of the claimant, knowledge of the claimant investor as to the facts allegedly misrepresented or omitted, statute of limitations, laches, waiver, estoppel, ratification, unclean hands and pari delicto;
>
> (b) As to the issue of damages only to the extent of determining value of [the particular interest received by the investor], together with loss of profits, if any, . . . up to the time of trial. The order further excluded evidence of defendants' oral misrepresentations from presentation at the class trial. The order, in addition, set the issues reserved to be determined: "upon individual claims to be filed within ninety days of any judgment in the action in favor of the plaintiffs."

Young at 690. The essential theory on appeal of petitioners was that the above-described order effectively denied them

> the Seventh Amendment right to a jury trial on the issues of their liability and the plaintiffs' damages. This is true, they assert, because the issues certified for class treatment by the district court are not so distinct and separable from the issues left for later determination that separate trials of those issues before separate juries can be held consistent with the Seventh Amendment.

Id.

Ruling that there was no "clear error" to justify the extraordinary relief of mandamus, the Ninth Circuit proffered the following reasons for its holding:

1) "None of the issues reserved [were] part of the plaintiffs' case-in-chief." (at 693)

2) There was no contention that "the trial judge reserved any item relevant to causation other than reliance for later determination." (at 693 n.11)

3) Reliance is not an essential element in a 10b-5 case, but rather, non-reliance is a basic defense. (at 694-696)

4) The reserved damages issue was "a discreet aspect of the case as a whole." (at 697)

5) The Order was "entered after many lengthy hearings on the class motion, extensive briefing by the parties, and serious and careful consideration of the entire matter by the district judge." (at 690)

If we analogize *Young's* "clear error" standard to the "plain error" standard pertinent to constitutional violations [see, i.e., *Beardshall v. Minuteman Press Inter., Inc.*, 664 F2d 23 (3rd Cir. 1981) – incorrect jury instruction as regards burden of proof is plain error, despite absence of objection], the foregoing five points are contrasted thusly as regards the within matter:

1) Reliance is a required element of plaintiff's case-in-chief. *Klemow vs. Time Incorporated*, 466 Pa. 189, 352 A2d 12, 16 n17 (1975), *cert denied* 429 US 828.

2) While this reviewing court shall ultimately determine whether the element of causation subsumes the issue of reliance, the within plaintiff further contends that items relevant to causation "other than reliance" were reserved for the second jury. Under the lower court's formulation, the interplay between the false discovery responses and the products liability verdict – the one item most "relevant to causation" was effectively reserved for the second jury.

3) [See #1 above, and #4 below]

4) Plaintiff maintained her burden of proving the factual basis for the amount of compensatory damages sought, due to the absence of a stipulation. Further, plaintiff sought exemplary damages. Under Pennsylvania law, the "state of mind of the actor is vital" to such a determination. *Feld vs. Merriam*, 506 Pa. 383, 485 A2d 742, 748 (1984). Thus, the damages issue in this instance is inextricably tied to those facts establishing liability.

5) There was but one relativeiy brief conference regarding the issue of bifurcation generally. The trial court resolved the separate jury issue after approximately 10 minutes of deliberations. [R1285a-1292a] There were no briefings on either the issue of bifurcation generally or bifurcation with separate juries specifically.

Hence, applying the *Young* reasons to the instant case, it is conspicuously clear that the lower court's discharge of the jury, who heard the evidence in phase one and returned a verdict in favor of plaintiff on her falsity issue, was contrary to the dictates of the Seventh Amendment.

Finally the defendant may argue that after over a year, the jury should not be recalled and perhaps that the jurors may have been subject to outside influences. This alleged problem can be simply resolved by asking under oath each juror if they can be *fair* to both sides.

2. Right to Amend Complaint

In *Averbach vs. Rival Manufacturing Co.*, 879 F2d 1196, the Court stated in part:

> "When this motion was first filed in October 1987, Averbach did not append a copy of her proposed amended complaint. The district court stated that the proposed complaint was needed so that it could evaluate the Motion, and denied leave to amend as presented. It noted that the dismissal of the RICO count had been affirmed on appeal, but it gave Averbach leave to renew the Motion to amend adding a claim under the consumer protection statute and buttressing the fraud count if Averbach proffered an amended complaint.

> Averbach failed to do so for more than three months. Then on March 11, 1988, four days before the deadline set for the close of discovery, Averbach filed another motion to amend her complaint. The district court denied this motion with prejudice, pointing out that it had been filed thirty-four months after the original complaint, more that three months after the court had dismissed the earlier motion without prejudice to renewal, and barely one month before the date set for trial . . . " 879 F2d at 1202-1203

The Third Circuit failed to note that the trial actually started on July 18, 1988 over four months after the March 1988 motion was filed which was based on Rival's own records. The delay was caused by Rival's refusal to reveal its records and prejudice was not a factor because the amendments consisted of Rival's records. Further, the amendments would be permitted under state law. *Connor vs. Allegheny General Hospital,* 461 A2d 600 (Pa. 1983).

The Third Circuit went on to state:

> "The Court rejected Averbach's contention that her delay resulted from the need to conduct further discovery, noting that the proposed amended complaint was identical to a complaint filed almost a year earlier in state court, which had been removed to federal district court and dismissed for improper splitting of a cause of action, a dismissal affirmed on appeal. See *Averbach vs. Rival Manufacturing Co.,* 845 F2d 1009 (3d Cir. 1988). The court also held that allowance of the proposed amendment at this late date would prejudice the defendant by asserting a new cause of action on the eve of trial . . . " 879 F2d at 1203

If the Third Circuit acknowledges that the March 1988 proposed complaint was identical to a complaint dismissed a year earlier then what prejudice or surprise was there to Rival? Further amendments on the "eve of trial" are permitted under state law. *Connor vs. Allegheny General Hospital,* 461 A2d 600 (Pa. 1983)

The Third Circuit further stated:

> "We review the trial court's denial of a request to amend the complaint for abuse of discretion. *Lewis vs. Curtis,* 671 F2d 779, 783 (3d Cir.), cert denied, 459 U.S. 880 (1982). Factors the trial court may appropriately consider in denying a motion to amend include undue delay, undue prejudice to the opposing party, and a futility of amendment." 879 F2d at 1203

Yet footnote 1 of *Averbach vs. Rival,* 809 F2d 1016 (3rd Cir. 1987) would suggest some merit to the RICO claim:

> 1. Averbach did not plead, and does not here contend that Rival Manufacturing Company's affairs were conducted in such a manner as to make Rival an enterprise for RICO purposes.

At the time of *Averbach II* only two cases were brought to the court's attention regarding fraud in discovery: *Averbach* and *Recoulley vs. Rival,* U.S.D.C for the Western District of Louisiana #83-2794. Later, the cases of *Garrett vs. Rival,* #86C-OC18 Kent County, Delaware and *Cobus vs. Rival,* supra revealed a pattern of fraud in discovery and trial testimony. Also, Rival failed to disclose over one hundred (100) fires during discovery in the case of *Thompson vs. Rival,* District Court of Lincoln County, Nebraska #84-58.

Mrs. Averbach filed the March 1988 motion because of the magnitude of Rival's fraud warranted consideration by the Court. There could be no prejudice to the defendant because the evidence consisted of Rival's own records and the trial did not begin until July 1988.

It is now clear that Rival has a policy of concealment of fires and its product's hazards. Rival's records also reveal a replacement of flammable tape with fire retardent tape in several models of can openers; a fact that was first disclosed during May 1988 when Rival first produced its Underwriters file.

It was recently determined in the New Jersey District Court that an amended complaint is permitted to assert a violation of the RICO statute for concealing the dangerous properties of a substance. See *Prudential Ins. Co. vs. U.S. Gypsum Co.*, 711 F. Supp. 1244 (D.N.J. 1989). The Court in *Prudential* stated in part:

> "As noted previously, Rule 15(a) specifically states that the court should permit a party to amend its pleadings "freely . . . when justice so requires." Thus, rule 15(a) reflects a general presumption in favor of allowing a party to amend its pleadings. See e.g. *Boleau vs. Bethlehem Steel Corp., et al* 730 F2d 929 (3d Cir. 1984), cert denied, 469 U.S. 871, 105 S.Ct 221, 83 L.Ed.2d 150 (1984) . . . See also *Kiser vs. General Electric Corp.*, 831 F2d 423, 427 (3d Cir. 1987), Cert denied ___ U.S. ___, 108 S. Ct 1078, 99 L.Ed 2d 238 (1988) in which the court stated that "great liberality in allowing amendment . . . is often appropriate, especially when an amendment

> will further the ends of justice, effectuate presentation of a suit's merits and not prejudice the opposing party." 711 F. Supp at 1259 Col 1

Mrs. Averbach's proposed amended complaint did not surprise or prejudice Rival since it was based on Rival's own records and conduct. This motion was filed on *March* 11, 1988 and the trial took place from July 18 to July 25, 1988. Rival had over *four months* to prepare a defense based on its own records.

Mrs. Averbach respectfully suggests that not to allow the amended complaint to assert a RICO claim and a violation of the Consumer Product Safety Act encourages Rival in its misconduct in the future.

During March 1989, in the case of *Montemagni vs. Rival,* #88-23937 Chicopee Division, Massachusetts when Rival was asked in discovery if it had any reports of fires from 1973 to 1987 the response was "the defendant has no report at this time". This falsehood was brought to the Third Circuit's attention and subsequently Rival's counsel in Massachusetts filed a second response claiming "no report" was due to "an error in transcription" and then objected to the request. At some point Rival has engaged in mail fraud and a violation of the RICO act.

As stated above, footnote 1 appears to give the Petitioner some direction and the plaintiff has attempted to follow those instructions several times. See *Averbach vs. Rival,* 809 F2d at 1018 footnote 1.

During the oral argument in *Averbach vs. Rival,* 809 F2d 1016 one of the panel members made the following comment:

"Now, Mr. O'Brien brings the case, and Rival and he wants to say – any lawyer in a products liability case – wants to investigate as to whether there has been any prior problem with electric can openers plugged in and whammo, starting fires. And according to Mr. O'Brien's Pleadings, Rival says next to no prior problems, there was one other incident and it was different or what have you.

Now, the Pleading here says it turns out that there were 23 prior instances where Rival can openers started fires. There was another lawsuit in Monroe, Louisiana where they made the same false allegation to a Plaintiff, i.e., that there was only one other incident and it turns out there were 23 and worse than that, they've got an expert Mr. Jesse – I forget the fellow's name – who's going from jurisdiction to jurisdiction making false representations. Now, I'm not suggesting that it's true, but it's alleged that it's true. And if it is true that a manufacturer is thwarting products liability plaintiffs by lying about past difficulties with its product, why isn't that a sufficiently serious fraud or misrepresentation that we in the Federal Courts ought to be very seriously concerned about people escaping what may be very serious liability by lying about the prior status of the product. And if that's true, why isn't that sufficient for us to say that this is the kind of fraud in common law that would justify setting aside a Judgment free of the one-year constraint?"

Rival's conduct is a serious matter and the Third Circuit's footnote 1 in *Averbach II* was not a total dismissal, but a call for clarification.

3. Is there a Private Cause of Action Under the Consumer Product Safety Act?

In *Averbach IV*, the Third Circuit stated in part:

> "The Court noted that the Consumer Product Safety Act claim did not identify the rule or order alleged to have been violated, and the plaintiff did not explain why the equitable relief sought would be appropriate in this case." 879 F2d at 1203

The Court went on to state:

> "The District Court concluded, adding a CPSA claim, even if legally viable, would introduce new issues into this already protracted litigation . . . " 879 F2d at 1203

Rival's own records show that it was warned during 1975 to report "hazards" under the CPSA section 15 two years before Mrs. Averbach's fire. In fact two consumer letters dated before Mrs. Averbach's fire have the notations "CPSC" and "possible CPSC" yet there is *no* record that Rival has reported any fire since 1975. The record is clear that there has been a violation, but is there a private cause of action?

As a result of opinions by District Courts and a State Supreme Court a private cause of action under the Consumer Product Safety Act has been recognized. *Young vs. Robertshaw Controls Co.*, 560 F. Supp. 288 (N.D.N.Y. 1983); *Butcher vs. Robertshaw Controls Co.*, 550 F. Supp 692 (D.MD. 1981); *Wilson vs. Robertshaw Controls Co.*, 600 F. Supp. 671 (N.D. Ind. 1985); *Payne vs. A.O. Smith Corporation*, 578 F. Supp. 733 (S.D. Ohio 1983); *Swenson vs. Emerson Electric Co.*, 374 N.W. 2d 690 (Minn. 1985), cert denied 476 U.S. 1130, 90 L.Ed.2d 678, 106 S.Ct. 1998.

However several Circuit Courts now state that there is no private cause of action. *Drake vs. Honeywell*, 747 F2d 603 (8th Cir. 1986); *Kelsey vs. Muskin*, 848 F2d 39 (2nd Cir. 1988); *Zepik vs. Tidewater Midwest, Inc.*, 856 F2d 936 (7th Cir. 1988); *Benitez-Allende vs. Alcan*, 857 F2d 26 (lst Cir. 1988).

In *Swenson vs. Emerson Electric Co.*, 374 N.W. 2d 690 (Minn. 1985), cert. denied 476 U.S. 1130, 90 L.Ed.2d 678, 106 S.Ct. 1998, the Supreme Court of Minnesota carefully examined the cases, the statute and legislative history and found:

> "We agree with the Trial court and the Court of Appeals and therefore hold that section 2072 of the Federal Consumer Product Safety Act provides a private cause of action for violation of the Consumer Product Safety Commission's substantial product hazard reporting regulations, codified at 16 C.F.R. § 1115.1-22. We base our holdings on the plain language of section 2072, the relevant federal precedent, and general principles of federal administrative law . . . " 374 N.W 2d at 699

In *Drake vs. Honeywell, Inc.*, 797 F2d 603 (8th Cir. 1986) the trend started that the Courts would not recognize a cause of action under the CPSA:

> "Section 15(b) of the statute specifically requires reporting of substantial product hazards. Violation of section 15(b) cannot be prosecuted by private action. The trouble with applying the plain meaning of "rule" to the Commission's substantial product hazard reporting rules, then, is that such a reading effectively renders privately enforceable the reporting requirement contained in section 15(b) of the statute. This would seem to frustrate the congressional

> intent, expressed by the omission of section 23(a), to deny a private cause of action to those injured from a violation of the statute itself. Thus, from a view of the Act as a whole, we would conclude that despite the plain meaning of "rule", failure to comply with the commission's reporting rules does not give rise to a private cause of action . . . " 797 F2d at 606 Col 2

The Court concluded

> "We believe that neither the structure of the Act, its relationship to well-settled principles of administrative law, its legislative history, nor its practical consequences, demonstrates that Congress intended a private cause of action to arise based on injury resulting from noncompliance with the product hazard reporting rules issued by the Commission. Therefore, the judgment of the district court is reversed and it is directed to dismiss Drake claim against Honeywell based on violation of 16 C.F.R. Part 1115 . . . " 797 F2d at 611 Col 2

In *Kelsey vs. Muskin*, 848 F2d 39 (2nd Cir 1988), the Court found that the plaintiff's injury was not "by reason of" any failure to disclose therefore did not address the conflict.

In *Zepik vs. Tidewater Midwest, Inc.*, 856 F2d 936 (7th Cir. 1988) the Court concluded:

> "Whatever added incentive to report might be gained by interpreting the phrase "by reason of" to permit private suits against violator of reporting requirements must be set against the consequences of this construction: a sharp departure from traditional standards of causation in tort and the expansion of federal subject matter jurisdiction to encompass a broad class of cases heretofore confined to state court except where

the requirements of diversity jurisdiction are met. We are unwilling to adopt a reading of the phrase "by reason of" that would entail these consequences without solid support for this outcome in the legislative history or structure of the CPSA . . . " 856 F2d at 944.

In *Benitez-Allende vs. Alcan,* 857 F2d 26 (lst Cir 1988) the Court rejected a CPSA claim:

"Although some district courts have permitted statutory actions for "failure to report," see, e.g. *Wilson vs. Robertshaw Controls Co.*, 600 F.Supp. 671 (N.D. Ind. 1985), the only circuit court to rule on the question, the Eighth Circuit, has not. *Drake vs. Honeywell, Inc.*, 797 F.2d 603 (8th Cir. 1986). The Eighth Circuit specifically held that Congress did not, in § 2072(a), create a "private right of action" based upon violation of the Commission's procedural reporting rule, a rule that basically repeats and elaborates the reporting requirements contained in a different statute, 15 U.S.C. § 2064(b). The Eighth Circuit pointed out that to interpret § 2072 to allow this type of private action would be odd, technically speaking, for the language of § 2072 provides a private right of action to enforce the Commission's "rules" and "orders;" it says nothing about enforcing provisions of the statute itself, such as the reporting requirements of § 2064(b). The parties point to nothing in the legislative history suggesting that Congress intended a private right of action to arise whenever a manufacturer violates a statutory reporting requirement. Yet, to point such an action would have broad substantive implications. It would mean plaintiffs could bring many (perhaps nearly all) products liability suits in federal court and obtain attorney's fees by alleging that the manufacturer of the defective product should have told the Commission about the

> defect. It seems unlikely Congress would have intended to bring about such an important result without even mentioning the matter. We see no need to repeat here the entire Eighth Circuit's analysis. We agree with its result for the reasons it has set forth . . . " 857 F2d at 35

Two years before Mrs. Averbach's fire, there was CPSA warning. If Rival had disclosed its knowledge of a fire hazard and a recall was issued, the Averbach fire may have been avoided. A year after her fire, a Rival letter to Underwriters Laboratories of August 10, 1978 showed that it replaced crepe paper tape covering motor coils with "fire retardant" tape. This letter was revealed after March 1988. Does Mrs. Averbach have a cause of action "by reason of" Rival's failure to report the fire hazard? There appears to be a difference of opinion on that issue.

If Mrs. Averbach does have a cause of action under the CPSA then would the amendment requested be futile?

If she does have a cause of action and the amendments are not futile then the trial court and the Third Circuit should have allowed the amendments to the complaint.

CONCLUSION

It would seem fundamentally unfair and a violation of the Seventh Amendment to the Constitution to discharge a jury after the first phase of a bifurcated fraud trial because the losing party expresses dissatisfaction with the verdict.

The Third Circuit in *Averbach IV* has directed the District Court to resolve Rival's outstanding motion for a new trial 879 F2d at 1202. If the trial Court grants Rival a new trial then clearly there will be no prejudice to Rival because it will have several months to prepare a defense to any amendment.

The delay was caused by Rival. There was no prejudice before the July 1988 trial and there can be no prejudice during a 1989 trial or during a 1990 trial. Finally, a RICO claim and CPSA claim are not futile.

The petition for a writ of Certiorari should be granted and upon review, the decision of the Court of Appeals regarding the Seventh Amendment and denial of Mrs. Averbach's motion to amend her complaint should be reversed.

Respectfully submitted:

Dated: November 1, 1989

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APPENDIX A

Filed: July 19, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-1957

SYLVIA AVERBACH,

Appellant

v.

RIVAL MANUFACTURING COMPANY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 85-2794)

Argued April 18, 1989

Before: SEITZ*, SLOVITER, and GREENBERG,
Circuit Judges

(Opinion filed July 19, 1989)

John J. O'Brien, III (Argued)
Philadelphia, PA 19103

Attorney for Appellant

Robert B. Mulhern, Jr. (Argued)
William T. Campbell, Jr.
Swartz, Campbell & Detweiler
Philadelphia, PA 19110

Attorneys for Appellee

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* Since the date of argument of this case, Judge Seitz has taken senior status.

OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

Appellant, Sylvia Averbach, brought this suit alleging that appellee, Rival Manufacturing Company, had committed common law fraud in filing false answers to interrogatories in a prior product liability action between the parties which Averbach lost. The district court in this case entered a judgment notwithstanding the verdict for Rival following the jury's responses to special interrogatories in a bifurcated trial. The principal issue before us is whether the jury could properly have found that Averbach relied on Rival's answers to interrogatories in the prior action.

I.

Facts and Procedural History

In 1977, Averbach suffered a fire in her home which she claimed was caused by an electric can opener with a design defect that allegedly caused continuous running, overheating, and ignition of the appliance. The can opener was manufactured by Rival. Averbach filed a product liability suit against Rival in the District Court for the Eastern District of Pennsylvania, alleging more than $200,000 in damages and invoking that court's diversity jurisdiction. One of the interrogatories propounded by Averbach to Rival read:

> 40. If the defendant has within the past five years received any complaints of an occurrence similar to those allegedly experienced by the plaintiff, please state for each such complaint:

(a) Its date;

(b) Its substance, including a description of the factual circumstances;

(c) The name and address of the person making the complaint.

App. at 65.

Rival's response was:

40. a. December 7, 1976.

b. The claim was for property damage to a house. It was alleged that a Rival Model 731/1 Can Opener/Knife Sharpener caused a fire. The evidence did not support the claimant's allegations, the claim was denied by the Company and dropped by the Claimant.

App. at 75.

The case was tried before a jury, which returned a verdict in favor of Rival in June 1981, from which Averbach did not appeal.

In September 1984, Averbach filed a motion for a new trial under Fed. R. Civ. P. 60(b) on the ground that she had recently received information showing that Rival falsely answered her Interrogatory Question No. 40, referring to records of the Consumer Product Safety Commission (CPSC) with respect to numerous complaints about fires caused by Rival's can openers during the period specified in the interrogatory. The district court denied the motion because it was not filed within one year after judgment as required for motions for new trial under Fed. R. Civ. P. 60(b) (3) based on fraud or misrepresentation, and this court affirmed by judgment order.

In May 1985, Averbach filed a two-count complaint against Rival in the Eastern District of Pennsylvania, this suit based on the allegedly false answer to the interrogatory in the product liability lawsuit. Count One was based on the Racketeer influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, and Count Two on common law fraud. The district court dismissed the complaint for failure to state claims upon which relief could be granted. On appeal, this court affirmed the dismissal of the RICO claim, holding that Averbach could not claim that the court system was an enterprise for purposes of RICO because the court personnel and litigants lacked a common purpose. However, we reversed the dismissal of the common law fraud claim, concluding that Averbach's complaint sufficiently stated a cause of action. *Averbach v. Rival Mfg. Co.*, 809 F.2d 1016, 1018-20 (3d Cir.), *cert. denied*, 482 U.S. 915 (1987) and 108 S. Ct. 83 (1987). As we noted, "[i]f the information from the files of the [CPSC] about fires begun by Rival electric can openers is true, the answers to interrogatories served in the underlying action are grossly false." *Id.* at 1018.

With respect to the district court's conclusion that the complaint failed to allege justifiable reliance as required under Pennsylvania law, we found "unpersuasive the proposition that the complaint was deficient in failing to allege the *self-evident purpose* of asking for information under penalty of false swearing in the course of discovery, or the *self-evident purpose* of responding to a request for such information." *Id.* at 1020 (emphasis added). We remanded the case to the district court with instructions to proceed on the common law fraud count, which had an

independent jurisdictional basis in diversity of citizenship.

Over Averbach's objection, the district court agreed to Rival's proposal to try the case by means of a bifurcated trial, with the first phase directed only to the question of whether the interrogatory responses were fraudulent, and the second phase to the issues of causation and damages. We note that this division is not along the common line of bifurcation between liability and damages. Nonetheless, Fed. R. Civ. P. 42(b) expressly authorizes a separate trial of any separate issue under certain circumstances, subject to seventh Amendment considerations.

The court advised the jury that the trial would be divided into two phases, saying: "During the first phase we will consider only whether there was a misrepresentation of fact fraudulently uttered by defendant with the intent to cause reliance by plaintiff and . . . whether such misrepresentation did, in fact, cause reliance by plaintiff. And I told you that the questions of causation and damages will be reserved for the second phase of this trial." App. at 749.[1]

At trial, Averbach presented evidence by way of a stipulation of uncontested facts of the occurrence of the

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[1] It was agreed that under this court's precedent, it was not necessary to reenact the underlying product liability action to establish causation. *See Honeywell Inc. v. American Standards Testing Bureau, Inc.*, 851 F.2d 652, 655-57 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 795 (1989) (in negligence action for failure to supply a promised witness at trial, causation may be established by expert testimony).

fire, Averbach's earlier suit against Rival, Averbach's propounding of the relevant interrogatories to Rival and Rival's answer identifying only one complaint. The stipulation also stated that, "[b]etween January 1, 1973 and July 1, 1979 (when the plaintiff's First Set of Interrogatories was answered), 81 claims that fires allegedly caused by different models of electric can openers were reported to Rival. There was one additional claim that a Rival electric can opener allegedly caused a fire between July 1, 1979 and September 14, 1979. From January, 1973 to June, 1981, Rival received over 100 alleged claims that its can opener products caused fires." App. at 616.

Averbach presented four live witnesses: Frank Kensill, an electrical contractor who reviewed the complaints received by Rival and the CPSC and who testified as an expert that, in light thereof, Rival's answers to Averbach's interrogatories "were false and purposely misleading," App. at 823; John Fred Jesse, an engineer employed by Rival, who had authored a memorandum in March 1979 reporting with respect to Rival's can opener products that "[n]umerous burn outs have been observed," App. at 1010; Gerald Waleski, another Rival employee, who had prepared Rival's answers to the interrogatories; and former state Judge Paul Chalfin, who had been hired as an expert witness for Rival and who had testified in deposition that Rival's answers were not dishonest or fraudulent. None of Averbach's witnesses testified or was in a position to testify that plaintiff relied on the false answers to the interrogatories in preparing the product liability suit for trial.

Rival's defense at trial focused on its contention that its answers to interrogatories were truthful because they

were directed only to the specific model can opener in Averbach's home, and did not encompass its numerous other models. Rival called Charles G. Young, III, an attorney, who testified about discovery procedures and gave his opinion that Rival's answer to Interrogatory No. 40 was truthful. Young explained that answers to interrogatories are sworn statements and that "you really follow up on discovery in a step fashion. . . .[O]ftentimes you'll see a set of interrogatories . . . that are designed to learn certain information and then that information that you learn may cause you to file additional written questions seeking more information." App. at 1167-68. On cross-examination Young acknowledged that he presumed all sworn answers to discovery requests to be true.

Rival made two motions for a directed verdict on the ground that Averbach had failed to prove all elements of fraud including reliance, but the motions were denied by the court. The court instructed the jury on the elements of common law fraud under Pennsylvania law, and, with respect to reliance, charged that the jury must find "that the Defendant intended that the Plaintiff rely on the Defendant's misrepresentation and . . . that the Plaintiff did rely on the Plaintiff's misrepresentation." App. at 1243.

The jury responded affirmatively to each of the following special interrogatories:

> 1. Do you find that plaintiff, Sylvia Averbach, has proven by clear and convincing evidence that the defendant, Rival Manufacturing Company, made a misrepresentation of fact in answering interrogatories during discovery in the 1981 products liability action?

. . .

2. Do you find that the plaintiff, Sylvia Averbach, has proven by clear and convincing evidence that the misrepresentation uttered by the defendant, Rival Manufacturing Company, was fraudulent?

. . .

3. Do you find that plaintiff, Sylvia Averbach, has proven by clear and convincing evidence that the misrepresentation uttered by defendant, Rival Manufacturing, concerned a material fact?

. . .

4. Do you find that the plaintiff, Sylvia Averbach, has proven by clear and convincing evidence that the fraudulent misrepresentation was uttered by the defendant, Rival Manufacturing Company, with the intent to induce reliance on the part of the plaintiff, Sylvia Averbach?

. . .

5. Do you find that the plaintiff, Sylvia Averbach, has proven by clear and convincing evidence that the plaintiff did in fact rely on a fraudulent misrepresentation uttered by the defendant, Rival Manufacturing Company?

App. at 229-31. These answers reflect, *inter alia*, the jury's rejection of Rival's defense that it was entitled to view the interrogatory as limited to the model of can opener owned by Averbach.

Following the jury's return of these answers, Rival moved that this jury be dismissed and a new jury be chosen to hear Phase Two of the trial. Rival argued that it would otherwise be prejudiced because "this jury . . . is not about to give Rival a reasonable trial on the second

issue [since it] already knows about 100 fire claims," App. at 1270. The court granted this motion and dismissed the jury.

Rival also moved for a judgment notwithstanding the verdict or in the alternative a new trial on the ground that, *inter alia*, Averbach failed to prove by clear and convincing evidence that she justifiably relied on Rival's answer to the interrogatory. The district court agreed, stating that none of the witnesses presented by Averbach had been involved in the preparation of her product liability case and therefore none testified or could testify from personal knowledge concerning plaintiff's preparation or trial of the first case. The court granted a j.n.o.v., finding that "[p]laintiff's evidence of fraud was critically deficient of any relevant evidence upon which the jury could conclude Averbach relied in fact on the response." App. at 224.

II.

The J.N.O.V.

Averbach appeals from the entry of the j.n.o.v. On such an appeal, we are called upon to review the record in the light most favorable to Averbach and may not sustain the lower court's order " 'unless the record is critically deficient of that minimum quantum of evidence from which the jury might reasonably afford relief.' " *Link v. Mercedes-Benz of North Am.*, 788 F.2d 918, 921 (3d Cir. 1986) (quoting *Dawson v. Chrysler Corp.*, 630 F.2d 950, 959 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981)).

Averbach argues, and Rival disputes, that the issue of reliance was to be addressed during the second phase of

the trial, and therefore that she was not obliged to treat reliance in Phase One. However, the district court specifically put the parties on notice at the pretrial conference and in its opening remarks to the jury that the reliance element of fraud would be tried in Phase One. Averbach, therefore, may not now complain of surprise that reliance was included as an element to be proven in the first phase at trial.

We therefore turn to Averbach's argument that there was sufficient evidence to support the jury's affirmative finding of reliance. Without deciding whether justifiable reliance can always be inferred from sworn answers to discovery requests, we agree with Averbach that under the circumstances of this case there was a sufficient basis for the jury to have made that inference. While it might have been prudent for Averbach to have presented testimony from her trial counsel at the earlier trial that he relied on Rival's answer to interrogatory and therefore did not make further inquiries with respect to other similar fires, we cannot say that the record presented here was "critically deficient" of any evidence from which the jury properly could have inferred such reliance by Averbach. *See Link*, 788 F.2d at 921.

The jury had evidence that Averbach proffered an interrogatory in the product liability case specifically directed to eliciting information known to Rival of complaints of an occurrence similar to those experienced by the plaintiff and that Rival answered that interrogatory identifying only *one* such occurrence. The jury also had evidence that Rival knew of 100 such fires related to its can openers during the period from January 1973 to June 1981.

Rival's own expert witness, a lawyer experienced in civil litigation, testified that he assumed all sworn answers received in the course of discovery to be true and further described discovery as a process in which information obtained at one stage determined what further information would be sought at the next. Viewed in the light most favorable to Averbach, this evidence, along with the explanation of how the discovery process works, constituted a sufficient basis from which the jury could conclude that Averbach's counsel relied on Rival's interrogatory answers in preparing for and in conducting the product liability trial, and in foregoing further inquiry with respect to other fires.

It is well-recognized that complete and accurate responses to discovery are imperative to the functioning of the modern trial process. *See Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1346 (5th Cir. 1978) ("It is axiomatic that '[d]iscovery by interrogatory requires candor in responding.' " (quoting *Dollar v. Long Mfg., N.C.*, 561 F.2d 613, 616 (5th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978))).

As the Supreme Court has explained:

> The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. . . . The new rules, however, . . . invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device . . . to narrow and clarify the basic issues between the parties, and (2) as a device

> for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in federal courts no longer need be carried on in the dark. The way is now clear . . . for the parties to obtain the fullest possible knowledge of the issues and facts before trial.

Hickman v. Taylor, 329 U.S. 495, 500-01 (1947) (footnotes omitted). The "[m]odern instruments of discovery" are thus a principal means by which trials are rendered "less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958). *See generally* 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2001 at 15 (1970) (describing purposes and uses of discovery).

The Federal Rules themselves recognize the reliance aspect of discovery, permitting parties to request information inadmissible at trial where such request is "reasonably calculated to lead to the discovery of admissible evidence." *See* Fed. R. Civ. P. 26(b)(1). Discovery could not serve the function of triggering subsequent inquiry if parties were not entitled to rely on the results obtained at each step. *See Rozier*, 573 F.2d at 1345 ("Our system of civil litigation cannot function if parties . . . suppress information called for upon discovery.")

Averbach certainly cannot be faulted for failing to pry further by discovery into the very same inquiry aborted by Rival's misleading answer. In fact, Rule 26 was amended in 1983 in an attempt to address the problem of duplicative discovery. *See* Fed. R. Civ. P. 26(a) advisory committee's note, 1983 amendment. A litigant is entitled to accept answers to previous interrogatories as

true, and to refrain from seeking additional discovery directed to the same issue. Because the Federal Rules of Civil Procedure are structured to elicit truthful answers given under oath, the opposing party, in circumstances such as presented here, may reasonably rely on interrogatory answers.

The Fifth Circuit in *Rozier* faced an analogous issue. After concluding that Ford Motor Company falsely stated in answers to interrogatories that it possessed no reports of the type the plaintiff inquired about, the court held that a new trial was warranted under a timely Rule 60(b)(3) motion because of Ford's misrepresentation. The court stated that Ford's nondisclosure prevented plaintiff from fully and fairly presenting her case because "[i]nevitably, information developed in the discovery stages of the case influenced the decision as to which theories would be emphasized at trial." 573 F.2d at 1342. The court thus concluded that, "[w]e are left with the firm conviction that disclosure of the [requested information] would 'have made a difference in the way plaintiff's counsel approached the case or prepared for trial.' " *Id.* (citation omitted).

We noted in our earlier opinion in this case that the purpose of asking for information under penalty of false swearing in the course of discovery and of responding to such requests is "self-evident." *Averbach*, 809 F.2d at 1020. If the appellate courts recognize that discovery responses are calculated to elicit reliance, certainly we must uphold

the jury's specific finding that there was such reliance.[2]

Because we conclude that there was a sufficient basis for the jury's affirmative response on the reliance element, the district court's entry of the j.n.o.v. cannot be sustained on the ground on which it was entered. The issue of Rival's fraud is now concluded unless there is some other error with respect to Phase One.

Under Fed. R. Civ. P. 50(c), a court granting a j.n.o.v. should at the same time "conditionally" dispose of all motions for a new trial. Rival made a new trial motion below on several grounds, and this motion remains pending at this time. The district court should therefore dispose of this motion on remand, *see Vander Zee v. Karabatsos*, 589 F.2d 723, 729 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 962 (1979), and if the court rejects Rival's pending post-trial motions, it should proceed to trial on Phase Two, as Averbach requests.

Our disposition makes it unnecessary for us to rule at this time on Averbach's contention that the district court's dismissal of the jury that heard the evidence in

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[2] The cases cited by Rival for the argument that there must be specific testimony of reliance are inapposite because they do not deal with reliance in the context of discovery where representations are sworn to be true. *Cf.* Country Shindig Opry, Inc. v. Cessna Aircraft Co., 780 F.2d 1408, 1412 (8th Cir. 1986) (remanding for new trial after verdict for plaintiff where plaintiff failed to present evidence that it relied on information contained in manufacturer's brochures); Gunsalus v. Celotex Corp., 674 F. Supp. 1149, 1160 (E.D. Pa. 1987) (reliance on cigarette company advertisements not established where ads "are not the kind of representations upon which reasonable people would rely").

Phase One violated her right to a jury trial under the Seventh Amendment. Rival, of course, having proposed the bifurcation and the dismissal of the first jury cannot now be heard to object. Averbach will be able to obtain review of claims of error related to these issues if she is aggrieved by the final outcome of the proceedings. *See e.g., Helene Curtis Indus. v. Church & Dwight Co.*, 560 F.2d 1325, 1335 (7th Cir. 1977), *cert. denied*, 434 U.S. 1070 (1978) (rulings related to separation of issues for trial pursuant to Rule 42(b) are "unappealable interlocutory order[s]").[3]

III.

Averbach's Motion to Amend the Complaint

Averbach also appeals from the district court's denial of leave to amend her complaint to plead fraud with more specificity, to request unspecified equitable relief, and to assert both a violation of what she termed the Consumer Protection Act (later explained to be the Consumer Product Safety Act (CPSA)) and of RICO. When this motion was first filed in October 1987, Averbach did not append a copy of her proposed amended complaint. The district court stated that the proposed complaint was needed so

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[3] We also reject Averbach's request that, in light of the possibility that a new trial will be ordered. We review her claims that the district court erred in various rulings on the admission of evidence. If no new trial order is granted these issues need not be reached since the jury's verdict in favor of Averbach in Phase One will be reinstated pursuant to this opinion. If the district court grants the motion for a new trial, the evidentiary rulings made at that trial will be fully reviewable on appeal from the final judgment entered thereafter. *See* Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980).

that it could evaluate the motion, and denied leave to amend as presented. It noted that the dismissal of the RICO count had been affirmed on appeal, but it gave Averbach leave to renew the motion to amend adding a claim under the consumer protection statute and buttressing the fraud count if Averbach proffered an amended complaint.

Averbach failed to do so for more than three months. Then on March 11, 1988, four days before the deadline set for the close of discovery, Averbach filed another motion to amend her complaint. The district court denied this motion with prejudice, pointing out that it had been filed thirty-four months after the original complaint, more than three months after the court had dismissed the earlier motion without prejudice to renewal, and barely one month before the date set for trial.

The court rejected Averbach's contention that her delay resulted from the need to conduct further discovery, noting that the proposed amended complaint was identical to a complaint filed almost a year earlier in state court, which had been removed to federal district court and dismissed for improper splitting of a cause of action, a dismissal affirmed on appeal. *See Averbach v. Rival Mfg. Co.*, 845 F.2d 1009 (3d Cir. 1988). The court also held that allowance of the proposed amendment at this late date would prejudice the defendant by asserting a new cause of action on the eve of trial. Finally, the court noted that the Consumer Product Safety Act claim did not identify the rule or order alleged to have been violated, and the plaintiff did not explain why the equitable relief sought would be appropriate in this case.

We review the trial court's denial of a request to amend the complaint for abuse of discretion. *Lewis v. Curtis*, 671 F.2d 779, 783 (3d Cir.), *cert. denied*, 459 U.S. 880 (1982). Factors the trial court may appropriately consider in denying a motion to amend include undue delay, undue prejudice to the opposing party, and futility of amendment. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). Although amendment should be freely permitted, in this case the district court's grounds, as set forth in its opinion, demonstrate that its decision to deny Averbach leave to amend was within the permissible range of its discretion.

Obviously, Averbach suffered no adverse consequences from the inability to amend the fraud count in light of her success on that issue. As the district court concluded, adding a CPSA claim, even if legally viable, would introduce new issues into this already protracted litigation. Finally, we agree that Averbach's attempt to resurrect her previously dismissed RICO count eight months after this court affirmed the dismissal of that claim represented too long a delay.

IV.

Conclusion

For the reasons set forth above, we will reverse the district court's entry of a j.n.o.v. on the issue of fraud. We will remand the case so that the court may rule on Rival's pending motion for a new trial and, if the motion is not granted, for trial on the remaining stage of the bifurcated

proceedings. We will affirm the district court's denial of Averbach's motion to amend her complaint.

Costs on appeal to be borne by appellee Rival.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYLVIA AVERBACH	:	CIVIL ACTION
	:	No. 85-2794
v.	:	
RIVAL MANUFACTURING COMPANY	:	

MEMORANDUM AND ORDER

FILED NOV - 2 1988

November 1, 1988

HUYETT, J.

This action, based on common law fraud, was brought by Sylvia Averbach claiming that an answer to an interrogatory by defendant Rival Manufacturing Company ("Rival") in a prior products liability lawsuit was fraudulent. Jurisdiction is based on diversity of citizenship, 28 U.S.C. § 1332 (1986).

Trial before me was bifurcated. The first phase was a trial on liability on the issue of whether the interrogatory response was fraudulent. The second phase was to cover the issues of causation and damages. At the close of the first phase of trial, the jury returned a verdict for the plaintiff on the issue of liability. Defendant has now moved for judgment notwithstanding the verdict or for a new trial. Because I conclude that plaintiff failed to introduce any evidence to support the jury's finding on the element of reliance in reaching its verdict, I shall grant defendant's motion for judgment n.o.v. I, therefore, do not reach defendant's other contentions.

I.

In 1977, plaintiff sustained damage to her home from a fire. The cause of the fire was allegedly an electric can opener/knife sharpener manufactured by Rival, Rival model number 731/1. On April 21, 1978, plaintiff filed a products liability action in the United States District Court for the Eastern District of Pennsylvania against defendant alleging, *inter alia*, that the can opener was defective. *Averbach v. Rival Manufacturing Co.*, Civil no. 78-1350.

During discovery in that action, in 1979, plaintiff propounded numerous interrogatories to defendant, only one of which remains at issue. Interrogatory No. 40 states the following:

> 40. If the defendant has within the past five years received any complaints of an occurrence similar to those allegedly experienced by the plaintiff, please state for each complaint:
>
> (a) Its date;
>
> (b) Its substance, including a description of the factual circumstances;
>
> (c) The name and address of the person making the complaint.

Defendant's reply was the following:

> 40. a. December 7, 1976.
>
> b. The claim was for property damage to a house. It was alleged that a Rival Model 731/1 Can Opener/Knife Sharpener caused a fire. The evidence did not support the claimant's allegations, the claim was denied by the company and dropped by the claimant.

c. This was a subrogation claim by State Farm Fire and Casualty Company, 5725 Foxridge Drive, Chawnee Mission, Kansas, 66202.

The action proceeded to trial and a jury returned a verdict for defendant on June 5, 1981. There was no appeal. On September 28, 1984, Averbach filed a Fed. R. Civ. P. 60(b) motion seeking a new trial. The motion was denied because it was filed more than one year after the judgment from which relief was sought. Averbach appealed and the Third Circuit Court of Appeals affirmed on November 1, 1985.

While that appeal was pending, Averbach filed this action on May 17, 1985. The original complaint pleaded one count of a violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 (1986) (RICO), and a second count averring common law fraud. I granted defendant's Fed. R. Civ. P. 12(b)(6) motion and dismissed the complaint. Plaintiff appealed. The Third Circuit Court of Appeals upheld my dismissal of the RICO count, but remanded the common law fraud count for further proceedings. *Averbach v. Rival Manufacturing Co.*, slip op., no. 86-1196 (Jan. 20, 1987 3rd Cir.).

After lengthy pre-trial proceedings, the action proceeded to trial before me. The jury returned a verdict for plaintiff on the issue of liability. Defendant promptly moved for judgment n.o.v. or for a new trial. Because of the state of the post-trial proceedings, I dismissed the jury to allow the trial record to be transcribed and the parties to submit briefs on the post trial motions. On July 27, 1988, I issued a written order continuing the second phase of the trial and setting forth a briefing schedule for post-trial motions. Plaintiff immediately appealed the

dismissal of the jury to the Third Circuit. Her appeal was dismissed for a jurisdictional defect. Plaintiff then moved for reconsideration, and concurrently filed a motion for a new trial in this court. As the plaintiff's appeal was still before the Third Circuit, I denied her motion for a new trial without prejudice. Concurrently, plaintiff withdrew her motion for a new trial. The Third Circuit also rejected plaintiff's request for reconsideration.

Defendant asserts several grounds in support of its motion for judgment n.o.v. or a new trial. I turn to the one issue which, if decided in Rival's favor, renders consideration of the others unnecessary.

II.

Federal Rule of Civil Procedure 50(b) governs the grant of judgment notwithstanding the verdict. It is an extraordinary remedy, granted only when "the evidence, exposed to the light most favorable to the non-moving party, supports only one conclusion, namely in favor of the movant." *Universal Computers v. Datamedia Corp.*, 653 F.Supp. 518, 523 (D.N.J. 1987), *aff'd*, 838 F.2d 1208 (3rd Cir. 1988); *Nanavati v. Burdette Tomlin Memorial Hospital*, 645 F. Supp. 1217, 1221 (D.N.J. 1986), *aff'd in part*, slip op., no. 86-5778 (Aug. 24, 1988 3rd Cir.); *Hild v. Bruner*, 496 F. Supp. 93, 97 (D.N.J. 1980). The standard is the same as for granting a directed verdict. *Skill v. Martinez*, 91 F.R.D. 498, 503 (D.N.J. 1981), *aff'd*, 677 F.2d 368 (3d Cir. 1982).

"[T]he question turns on 'whether as a matter of law the record is critically deficient of that minimum quantum of evidence from which a jury might afford relief' . . . [N]either the credibility of the evidence nor the

weight of it may be considered." *Borbely v. Nationwide Mutual Insurance Co.*, 547 F.Supp. 959, 965 (D.N.J. 1981), *quoting, Universal Computer Systems, inc. v. Medical Services Association of Pennsylvania*, 474 F. Supp. 472, 475 (M.D.Pa. 1979), *modified on other grounds*, 628 F.2d 820 (3rd Cir. 1980). Further, "[t]he proper question is not whether there is literally no evidence supporting the party against whom the motion is made but whether there is evidence upon which the jury could properly find a verdict for that party. *Trainer v. Philadelphia National Bank*, 541 F. Supp. 195, 197 (E.D.Pa. 1982), *aff'd*, 707 F.2d 1395 (3rd Cir. 1983).

The elements of a misrepresentation claim under Pennsylvania law are (1) a misrepresentation, (2) uttered by the defendant to the plaintiff, (3) of a material fact, (4) with the intention that plaintiff would rely on the defendant's misrepresentation, and (5) justifiable reliance by the plaintiff on the misrepresentation.[1] *See Scaife Co. v. Rockwell Standard Corp.*, 446 Pa. 280, 285 A.2d 451, 454 (1971); *see also Villari v. Terminix International, Inc.*, 677 F. Supp. 330, 336 (E.D. Pa. 1987) (Pollak, J.).

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[1] These elements were mirrored in my charge to the jury. N.T., July 25, 1988, at 27-28. The jury was also given interrogatories with the five following questions, each to be answered unanimously in the affirmative in order to return a verdict for plaintiff.

> 1. Do you find that plaintiff, Sylvia Averbach, has proven by clear and convincing evidence that the defendant, Rival Manufacturing Company, made a misrepresentation of fact in answering interrogatories during discovery in the 1981 products liability action?

(Continued on following page)

Under Pennsylvania law, proof of fraud must meet a standard higher than a preponderance of the evidence. The proof must be clear and convincing. *Beardshall v. Minuteman Press International, Inc.*, 664 F.2d 23, 26 (3rd Cir. 1981); *Snell v. Pennsylvania*, 490 Pa. 277, 281, 416 A.2d 468, 470 (1980).

Defendant argues that plaintiff's case provided no evidence on which the jury could conclude plaintiff relied on Rival's response to the interrogatory. After a careful review of the entire trial transcript, I am unable to locate any evidence which could support the jury's affirmative answer to interrogatory number 5, finding that Averbach in fact relied on the interrogatory response.

(Continued from previous page)

2. Do you find that the plaintiff, Sylvia Averbach, has proven by clear and convincing evidence that the misrepresentation uttered by defendant, Rival Manufacturing Company, was fraudulent?

3. Do you find that plaintiff, Sylvia Averbach, has proven by clear and convincing evidence that the misrepresentation uttered by defendant, Rival Manufacturing, concerned a material fact?

4. Do you find that the plaintiff, Sylvia Averbach, has proven by clear and convincing evidence that the fraudulent misrepresentation was uttered by the defendant, Rival Manufacturing Company, with the intent to induce reliance on the part of the plaintiff, Sylvia Averbach?

5. Do you find that the plaintiff, Sylvia Averbach, has proven by clear and convincing evidence that the plaintiff did in fact rely on a fraudulent misrepresentation uttered by the defendant, Rival Manufacturing Company?

Plaintiff presented the testimony of Frank Kensill, John. F. Jesse, Gerald L. Wasleski and Paul M. Chalfin. Mr. Kensill was presented as an expert on electrical engineering. He did testify, over defendant's objection, that he believed Rival's answer to the interrogatory was fraudulent. Mr. Kensill was in no way involved in the products liability case. Because he was not involved in the preparation or trial of that case, he had no knowledge regarding what information was relied on. *See Thomas v. Seaman*, 451 Pa. 347, ___, 304 A.2d 134, 138 (1973) (personal involvement in fraudulent transaction supports finding that evidence of reliance was sufficient to uphold jury verdict as a matter of law).

Similarly, the other witnesses were not involved in the preparation of plaintiff's products liability case. In fact, plaintiff's three other witnesses are affiliated with Rival, and were called as adverse witnesses pursuant to Fed. R. Evid. 611(c). Mr. Jesse is a Rival employee who may have taken part in formulating Rival's answers to the interrogatory. Mr. Wasleski is a Rival employee who oversaw the formulation of the interrogatory response. Judge Chalfin is an expert witness employed by Rival in this case. He was employed as a Pennsylvania state court judge at the time of the first lawsuit. None of these witnesses testified, or could testify from personal knowledge, concerning plaintiff's preparation or trial of the first case.

During the colloquy that followed the jury's verdict, counsel for plaintiff, John J. O'Brien, III, summarized the evidence plaintiff had presented to show reliance. "So, I think reliance can be inferred from the conduct and the result as well. I might add, your honor, that I thought

reliance is part of causation, the second phase. . . ."[2] N.T., July 25, 1988, at 54; *see also id.*, at 36 ("[J]ustifiable reliance, I'd also suggest is also a matter of causation, the

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[2] A pre-trial conference was held on the record on April 5, 1988. At that conference, defendant proposed a trifurcated trial. Under defendant's proposal, the first phase of the trial would include whether the interrogatory responses were fraudulent. The second phase would consider whether, if the responses were fraudulent, they altered the jury verdict. The final proposed phase would consider whether the can opener caused the fire. During the conference, no one suggested that "reliance" would be part of the second phase of trial.

Also during the conference, I stated the trial of this action would not be "retrying the merits of the 402A case." N.T., April 5, 1988 at 15. Accordingly, on April 5, 1988, I issued a written order that the trial would be bifurcated. My order stated:

> In the first phase of the trial, we will consider only the question of whether the interrogatory responses were fraudulent. The second phase of trial will concern issues of causation and damages.

In the three months between the conference and trial, plaintiff never requested clarification of the order. There were two conferences with counsel in the week before trial, both held on the record. No question was raised concerning the scope of the first phase. During my opening remarks to the jury, I read the elements of fraud as set forth above. N.T., July 19, 1988, at 12. Plaintiff never once objected or questioned during the entire trial, or at any of the conferences during trial, whether reliance was part of the first phase of trial. Only at the close of the charge conference, when counsel were asked to review the jury interrogatories, did plaintiff raise the issue. N.T., July 25, 1988, at 35-36 I ruled that reliance was an essential element of fraud and was clearly part of the first phase of the trial. N.T., July 25, 1988, at 54.

other portion of the trial."). Further, in response to the instant motion, plaintiff reveals her lack of reliance evidence.

> The jury is [sic] presented with the fact that Rival revealed only one fire and the first jury found for the defendant. Later it was found that Rival had over one hundred (100) fires. Logically, the plaintiff lost first case because the first jury did not have before it the one hundred fires. Reliance is clear. The plaintiff *refrained* from presenting evidence of other fires because it was concealed by Rival. The reason and result of Rival's fraud was clear to the jury.

Plaintiff's Response to Defendant's Motion, at 4.

This is the *post hoc* argument of counsel. There was no testimony about how or what Averbach refrained from doing in the first case.

In the prior appeal of this case, the Third Circuit alluded to the problem plaintiff now faces. "Here, we infer that defendants are alleged to have made their false statements with the intention of inducing plaintiff to rely detrimentally thereon." *Averbach v. Rival Manufacturing*, slip op. no. 86-1196, at 9 n.2 (3rd Cir. January 20, 1987). Plaintiff now asks that the jury be permitted to infer reliance as did the Third Circuit when reviewing the sufficiency of the complaint. The cases interpreting the reliance element under Pennsylvania law do not support plaintiff's contention.

In *Thomas v. Seamen*, 451 Pa. 347, 304 A.2d 134, 138, the Pennsylvania Supreme Court found that plaintiff's decendent's own statement about her reliance on defendant's fraudulent statement was sufficient evidence of

reliance as a matter or law. In *Michelson v. Exxon Research & Engineering Co.*, 588 F. Supp. 92, 94 (W.D. Pa. 1984), an action was dismissed on the pleadings for lack of evidence that the plaintiff relied on the alleged fraudulent communication. In *Gunsalus v. Celotex Corp.*, 674 F.Supp. 1149 1160 (E.D.Pa. 1987), Judge Shapiro granted summary judgment for the defendant tobacco manufacturer when plaintiff's deposition showed that plaintiff could not have relied *solely* on defendant's advertisements as the reason he continued to smoke. In *Villari*, 677 F.Supp. at 336, Judge Pollak granted summary judgment on plaintiff's misrepresentation claim where evidence showed that the plaintiffs *could have* acted based on reasons other than defendants' alleged misrepresentation. While the instant suit has proceeded beyond the summary judgment stage, these cases require that plaintiff produce at least some evidence upon which a jury can find reliance. The jury is not allowed to infer the existence of an element of the claim where plaintiff fails to introduce any evidence.

Plaintiff argues that she believed that reliance would be part of the causation trial. Admittedly, reliance is intertwined with causation. However, in *Gunsalus*, Judge Shapiro referred to causation as part of the "causal nexus" between the misrepresentation and the harm plaintiff claims. 674 F. Supp. at 1160.

Applying that reasoning to this case, causation in these circumstances is clearly different from reliance. Reliance evidence[3] in the first phase of the trial would be

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[3] I note that the jury was properly instructed on the reliance element, N.T., July 25, 1988, at 29, 30 and neither party objected to this instruction. *See Scafie Co. v. Rockwell-Standard Corp.*, 466 Pa. 280, 285 A.2d 451, 455-56 (1972).

evidence that Averbach, in preparing for the first trial or during the first trial, acted or refrained from acting in some way that she would have done differently if she knew of the additional fires. In the causation phase of this trial, to sustain her burden, Averbach must show that the failure to disclose the additional fires caused her to lose the first trial. More specifically, causation is proof that the first jury would have returned a verdict for Averbach if she had acted or not refrained from acting in reliance upon the interrogatory response. This distinction, when viewed in light of the entire record of pretrial and trial proceedings, renders plaintiff's claim that she was not required to introduce reliance evidence during the first phase of trial nugatory.

III.

Plaintiff's failure to introduce evidence of an essential element of her claim in no way requires an evaluation of the credibility of the witnesses plaintiff presented. Plaintiff's evidence of fraud was critically deficient of any reliance evidence upon which the jury could conclude Averbach relied in fact on the response. The verdict of the jury must, therefore, be overturned as a matter of law. I need not, therefore, consider the alternative grounds defendant contends support judgment n.o.v. or a new trial.

An appropriate order is attached.

/s/ Daniel H. Huyett
Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYLVIA AVERBACH	: CIVIL ACTION
	: No. 85-2794
v.	:
RIVAL MANUFACTURING CO.	:
	:

ORDER

November 1, 1988

HUYETT, J.

Upon consideration of defendant Rival Manufacturing Company's Motion for Judgment Notwithstanding the Verdict or for a New Trial, plaintiff Sylvia Averbach's responses thereto, the supporting memoranda, exhibits, the transcript of the trial, the exhibits introduced at trial, and for the reasons stated in the attached Memorandum of Law,

Defendant's motion for Judgment Notwithstanding the Verdict is GRANTED. Judgment n.o.v. shall be entered IN FAVOR OF defendant Rival Manufacturing, and AGAINST plaintiff Sylvia Averbach. Defendant's Motion for a New Trial is DENIED.

IT IS SO ORDERED.

/s/ Daniel H. Huyett
Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYLVIA AVERBACH	:	CIVIL ACTION
	:	No. 85-2794
v.	:	
RIVAL MANUFACTURING COMPANY	:	

MEMORANDUM AND ORDER

December 2, 1988

HUYETT, J.

After the first phase of trial, a jury returned a verdict for plaintiff Sylvia Averbach and against defendant Rival Manufacturing Company ("Rival"), finding that a response to an interrogatory by Rival in a products liability lawsuit brought by Averbach in 1979 was fraudulent. In a memorandum opinion dated November 1, 1988, I granted Rival's motion for judgment notwithstanding the verdict based on the failure of plaintiff to introduce any evidence that plaintiff justifiably relied on the interrogatory response in the preparation or conduct of the products liability lawsuit. Plaintiff moves for reconsideration of my ruling on Rival's motion.

In her motion for reconsideration, plaintiff argues that I should take judicial notice of the purpose of pre-trial discovery under the Federal Rules of Civil Procedure, and that, as the purpose of pre-trial discovery is to gain information of the opposing party's claims or defenses, I should "presume a justifiable expectation" on the part of plaintiff that Rival's response to the interrogatory was truthful. Motion for Reconsideration, at 4. Therefore, according to plaintiff, I should reverse my

grant of judgment notwithstanding the verdict, and allow plaintiff to introduce evidence of reliance in the second phase of the trial which was to include the issues of causation and damages.

I agree that what counsel for plaintiff did or refrained from doing in the products liability lawsuit is "logically pertinent to the element[] of causation. . . ." However, as I stated in my prior memorandum, justifiable reliance is an element of a misrepresentation claim under Pennsylvania law. Slip opinion, at 5-6, 8-9 n.2. I, therefore, find no basis in plaintiff's motion for reconsideration to believe that reliance evidence is relevant *only* to the causation phase of the trial.

To the extent plaintiff's motion cryptically makes reference to F.R.Civ.P. 60(b)(3), I find no basis to provide plaintiff relief from the grant of judgment notwithstanding the verdict in favor of defendant Rival.[1]

An appropriate order follows.

/s/ Daniel H. Huyett
Daniel H. Huyett, 3rd, Judge

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[1] I note that on November 28, 1988, plaintiff filed a notice of appeal with the United States Court of Appeals for the Third Circuit. I am issuing the ruling on this motion on the assumption that neither party contests my jurisdiction to do so.

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

SYLVIA AVERBACH	:	CIVIL ACTION
	:	No. 85-2794
v.	:	
RIVAL MANUFACTURING COMPANY	:	

ORDER

December 2, 1988

HUYETT, J.

Upon consideration of plaintiff Sylvia Averbach's Motion for Reconsideration, defendant Rival Manufacturing Company's response thereto, my Memorandum in this action dated November 1, 1988, and for the reasons stated in the attached memorandum,

Plaintiff Averbach's motion is DENIED.

IT IS SO ORDERED.

/s/ Daniel H. Huyett
Daniel H. Huyett, 3rd, Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-1957

Sylvia Averbach,
Appellant

v.

Rival Manufacturing Co.

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, and SEITZ,* *Circuit Judges*.

The Petition for rehearing filed by Appellant, Sylvia Averbach, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
/s/ Delores Sloviter
Circuit Judge

Dated: AUG 17 1989

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*Hon. Collins J. Seitz, Senior Circuit Judge, as to panel rehearing only.